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No. 58490-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

INDOOR BILLBOARD/WASHINGTON, INC.,
a Washington corporation, individually and on behalf of a class of persons and/or entities similarly situated,

Appellant/Cross-Respondent,

v.

INTEGRA TELECOM OF WASHINGTON, INC.,
a Washington corporation,

Respondent/Cross-Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error.

This is an appeal from the trial court's dismissal by summary judgment of a putative class action brought by Plaintiff, Indoor Billboard/Washington, Inc. ("Indoor Billboard"), against Defendant, Integra Telecom of Washington, Inc. ("Integra"), asserting a single claim for relief under the Washington Consumer Protection Act ("CPA"), RCW Chapter 19.86. Indoor Billboard makes the following assignments of error:

1. The trial court erred in granting Integra's motion for summary judgment, by Order dated June 2, 2006, dismissing Indoor Billboard's CPA claim.

2. The trial court erred in denying Indoor Billboard's motion for reconsideration of the summary judgment decision, by Order dated July 2, 2006.

3. The trial court erred in entering Judgment in favor of Integra on July 2, 2006.

B. Issues Pertaining to Assignments of Error.

1. Does a telephone company commit an unfair and deceptive practice in violation of the CPA by collecting a surcharge

misrepresented to be a Presubscribed Interexchange Carrier Charge or "PICC"—a surcharge created, defined and regulated by the Federal Communications Commission—when it is not?

2. Under this Court's holding in Pickett,[1] when a telephone company unfairly and deceptively collects a surcharge misrepresented to be a PICC when it is not, is the causation element of a private CPA claim satisfied by the plaintiff's payment of the surcharge, such that proof of individual reliance on the misrepresentation is unnecessary?

3. Even were individual reliance required to satisfy the causation element of a CPA claim in such a case, does the plaintiff's testimony that he was misled to believe the surcharge was a true, FCC-regulated PICC when he paid his telephone bill sustain a genuine issue of fact concerning his reliance, thereby precluding summary judgment on the causation element of his claim?

4. Similarly, does a genuine issue of fact concerning the extent of plaintiff's knowledge and understanding of the true nature of the disputed "PICC" surcharge when the surcharge was paid

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[1] Pickett v. Holland America Line-Westours, Inc., 101 Wn. App. 901, 920, 6 P.3d 63 (2000), reversed on other grounds, 145 Wn.2d 178, 35 P.3d 351 (2001).

preclude adjudication of a "voluntary payment doctrine" defense on summary judgment?

II. STATEMENT OF THE CASE

A. Nature of the Action.

In this action, Indoor Billboard asserts a single claim for relief under the Washington CPA on behalf of itself and a putative class of similarly situated persons and business entities. (CP 43-66). The gravamen of Indoor Billboard's CPA claim is that Integra committed an unfair and deceptive trade practice by charging its local telephone exchange service customers here in Washington a surcharge falsely denominated as a "Presubscribed Interexchange Carrier Charge," or "PICC," when in fact the surcharge was really just an extra charge Integra imposed on its customers, very different in nature than the PICC surcharge created, defined and regulated by the FCC.[2] Simply stated, Indoor Billboard's CPA claim is that Integra has unfairly and

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[2] As discussed more fully below, a true PICC is a surcharge created and regulated by the FCC that "incumbent" local exchange carriers are permitted to collect from **interexchange** (long distance) **carriers** with whom their multi-line business customers have **presubscribed** for long distance service—hence the name, Presubscribed Interexchange Carrier Charge or PICC. See 47 C.F.R. § 69.153 (copy attached as Appendix A); (CP 378-79).

deceptively collected monies from its customers under the guise of a surcharge the nature of which Integra misrepresented to be something that it isn't.

B. Proceedings Below.

Indoor Billboard commenced this action on August 22, 2005 by filing its Class Action Complaint. (CP 43-66). Integra responded to Indoor Billboard's complaint by filing a motion to dismiss under CR 12(b)(1), arguing that the Washington Utilities and Exchange Commission ("WUTC") had exclusive, or, in the alternative, primary jurisdiction over the subject matter of this action. (CP 1-12). Indoor Billboard opposed the motion. (CP 13-29). The Court denied the motion without oral argument by Order misdated October 8, 2005 but actually entered on November 8, 2005. (CP 39-40).[3] Integra then answered Indoor Billboard's complaint (CP 66-73) and the parties proceeded with discovery.

By stipulation, the parties agreed to a briefing and hearing schedule for Integra's motion for summary judgment and Indoor

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[3] Integra unsuccessfully sought discretionary review of the trial court's November 8, 2006 Order in this Court. See Court of Appeals Case No. 57398-5.

Billboard's motion for class certification—the former to be heard on June 2, 2006 and the latter to be heard one week later. (CP 74-76). Integra filed its motion for summary judgment and supporting papers on April 21, 2006, arguing that Indoor Billboard could not establish the first (an unfair and deceptive practice) and fifth (causation) elements of a private CPA claim. (CP 77-183). Indoor Billboard submitted its memorandum in opposition to Integra's motion on May 12, 2006 (CP 251-75). Indoor Billboard's evidentiary submissions in opposition to Integra's motion included the incorporation by reference of evidence previously submitted in support of its motion for class certification (CP 349-447), together with a supplemental evidentiary submission (CP 184-250). Integra filed its reply papers on May 26, 2006.

Integra's motion for summary judgment came before the trial court on June 2, 2006. After hearing argument from counsel, the trial court granted Integra's motion for summary judgment (CP 290-91) and signed the proposed Order to that effect that had been submitted by Integra. (CP 292-93). The hearing was not reported (CP 290) and the Order does not indicate the grounds for the trial court's decision, other than a generic finding that the standard for

summary judgment under CR 56(c) had been met. (CP 292-93). The Order does contain the trial court's handwritten notation that the decision was not based on the "voluntary payment doctrine," which Integra had invoked as part of its challenge to the causation element of Indoor Billboard's CPA claim. (CP 293).

Indoor Billboard timely filed a motion for reconsideration of the trial court's summary judgment decision on June 7, 2006. (CP 294-315). The motion for reconsideration focused on the causation element of Indoor Billboard's CPA claim, because certain comments by the trial court at the unreported summary judgment hearing suggested that the trial court had held Indoor Billboard to an incorrect standard of causation in granting Integra's motion. (CP 295, 300). By Order dated June 9, 2006, the trial court requested a response to the motion from Integra (CP 316), which Integra filed on June 19, 2006. (CP 317-28).

The trial court entered an Order denying Indoor Billboard's motion for reconsideration on July 2, 2006. (CP 333-35). On the same date, the trial court entered final Judgment in favor of Integra. (CP 336-37). Indoor Billboard timely filed its notice of appeal on July 6, 2006. (CP 338-46). On August 1, 2006, Integra filed its

notice of cross-appeal from the trial court's November 8, 2005 Order denying Integra's CR 12(b)(1) motion to dismiss. (CP 36-40).

C. Statement of the Facts.

1. Integra's "PICC" Surcharge.

From September 2001 through July 2005, Integra carried out a common practice and policy of charging and collecting from its basic business line and digital business line customers here in Washington a surcharge it denominated as a "Presubscribed Interexchange Carrier Charge" or "PICC" in the amount of $4.21 per line, per month. (CP 360; 370-75; 392; 407-08). As discussed below, however, Integra's "PICC" was a "PICC" in name only.

In the usage of the telephone industry, a PICC surcharge is an FCC-regulated surcharge. See 47 C.F.R. § 69.153 (Appendix A). First introduced by the FCC in 1997, the PICC is a surcharge incumbent (dominant) local exchange carriers[4] (the old "Baby

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[4] For purposes of 47 C.F.R. Part 69, a telephone company or local exchange carrier means an "incumbent local exchange carrier as defined in section 251(h) of the 1934 [Telecommunications] Act as amended by the 1996 [Telecommunications] Act." 47 C.F.R. § 69.2(hh). Under Section 251(h) of the 1996 Act, an incumbent local exchange carrier "means with respect to an area, the local exchange carrier that--
(A) on February 8, 1996, provided telephone exchange service in such area; and (B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the

Bells", such as Qwest and Verizon here in Washington) are permitted to collect from **interexchange** (long distance) **carriers** with whom the incumbent local exchange carriers' multi-line business customers have **presubscribed** for long distance service—hence the name, Presubscribed Interexchange Carrier Charge. § 69.153(a); (CP 378). The PICC affords incumbent local exchange carriers (whose rates and fees remain subject to FCC regulation) a means of recovering from their customers' presubscribed long distance carriers part of otherwise unrecovered costs of providing the long distance carriers with access to the incumbent carriers' "local loop."[5] § 69.153(a); (CP 378).

The amount of a particular incumbent carrier's PICC surcharge is regulated by FCC formula, but could not exceed **$4.31** per line, per month during the relevant time period. § 69.153(a); (CP 378). Long distance carriers may pass through to their

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Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i)." 47 U.S.C. § 251(h)(1).

[5] In the telephone industry, "local loop" is a term of art that refers to the outside telephone wires, underground conduits, telephone poles and other facilities that link each telephone customer to the telephone network. (CP 378). Without access to the "local loop," long distance carriers could not complete a long distance call.

customers any PICC paid to the incumbent local exchange carrier by including a PICC surcharge on their customers' bills for long distance service. (CP 378). Under FCC regulation, an incumbent local exchange carrier can impose a PICC surcharge directly on an end-user customer only when the customer has not presubscribed to any long distance carrier. § 69.153(b).

As Integra's representatives have admitted (CP 410, 417; 426), the **$4.21** per line, per month surcharge Integra chose to denominate as a "PICC" is fundamentally different in nature than the PICC created, defined and regulated by the FCC, in that:

- As a "competitive" (unregulated) local exchange carrier ("CLEC"), rather than an incumbent carrier, Integra is not the kind of local exchange carrier for whom the FCC created the PICC as a means of "local loop" cost recovery (CP 396);
- Unlike a true PICC, Integra's "PICC" surcharge was not regulated in any way by the FCC, as Integra admitted in its motion (CP 95)[6];
- Unlike a true PICC, Integra's "PICC" had nothing to do with a customer's presubscription to an interexchange (long distance) carrier (CP 360-61; 407-08; 410-11);

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[6] Integra explicitly acknowledged its motion that the FCC "does not regulate in any way the circumstances in which a CLEC may charge a PICC" and that "[t]he FCC simply does not regulate CLEC charges to their end-user customers." (CP 95-96).

- Unlike a true PICC, Integra's "PICC" surcharge was not a pass-through of a PICC assessed by an incumbent local exchange carrier (CP 401); and

- Unlike a true PICC, Integra's "PICC" was not derived from, or assessed as a means of recouping, any particular defined subset of Integra's operating costs and, more specifically, had no greater or closer relationship to the recovery of "local loop" costs than Integra's standard monthly recurring charges for basic business line service (CP 402; 242).

In reality, Integra's "PICC" surcharge was just an extra charge Integra instituted in connection with a marketing department-driven restructuring of its charges for service, in which "[n]ew, lower line rates plus the PICC . . . replaced a higher line rate without the PICC." (CP 420) (emphasis supplied) (copy attached as Appendix B).

From the beginning, Integra was aware that its "PICC" was a distinctly different animal than a true PICC. Integra's Director of Product Marketing, Michael Huebsch, highlighted this distinction in an internal memorandum titled "PICC*" circulated upon introduction of the new surcharge. (CP 420) (Appendix B). In a footnote corresponding to the "PICC*" title of his memorandum, Mr. Huebsch acknowledged that "[f]rom a technical perspective, the PICC is defined as a fee that long distance companies pay to incumbent local telephone companies to recover part of the local

loop costs." (CP 420). According to Mr. Huebsch, the purpose of this footnote was to emphasize to his subordinates that the "PICC" surcharge Integra was introducing was technically "something different" than a true PICC. (CP 417).

Yet despite the acknowledged difference between its "PICC" and a true PICC, Integra described its "PICC" as if it were a true PICC on the "Guide to Surcharges, Taxes and Fees" page of its website:

> The PICC is a fee charged by incumbent local telephone companies to recover part of the costs of providing the "local loop." The local loop is a term that refers to the outside telephone wires, underground conduits, telephone poles, and other facilities that link each telephone customer to the telephone network.

(CP 392). This description tracks almost verbatim the FCC's description of a true PICC on the FCC's Consumer Fact Sheet webpage (CP 378), and fails entirely to capture the real nature of Integra's "PICC" as merely an additional charge for its service with no greater or closer relationship to the recovery of Integra's "local loop" costs than Integra's standard monthly recurring charges. (CP 242).

Integra misrepresented its "PICC" surcharge to be a true PICC in other ways as well. For example, although the "PICC"

surcharge was really just a component of Integra's restructured pricing model—under which "[n]ew, lower line rates plus the PICC . . . replaced a higher line rate without the PICC" (CP 420)—Integra did not group the "PICC" surcharge with the other components of its standard monthly line charges on its customer invoices. (CP 382-87). Instead, Integra itemized the "PICC" surcharge under the "Taxes and Surcharges" section of its invoice (CP 385), placing the "PICC" surcharge in the middle of a lengthy list of taxes or governmentally levied fees, such as "City Sales Tax," "City Utility Users Tax," "County 911," "Federal Excise Tax," "State Sales Tax," "Telecommunications Relay Service," and "WA Telephone Assistance Plan." (CP 385). The obvious implication was that the "PICC" surcharge likewise was a governmentally levied or regulated tax or fee, different in nature than the standard monthly line charges appearing elsewhere on the invoice. This misleading impression was further reinforced by Integra's website, which advised customers that the "taxes and surcharges" appearing on their bill were "levied . . . on behalf of the governmental entities that administer these charges." (CP 389). This was, of course, patently

untrue with respect to the "PICC" surcharge, as Integra now concedes. (CP 400-01).

Even as it phased out the "PICC" surcharge last year, Integra continued to mislead its customers to believe that the "PICC" surcharge was a governmentally prescribed or regulated fee. In August of 2005, Integra replaced its "PICC" surcharge (and its Local Number Portability or "LNP" surcharge) with a new surcharge denominated as an "Interconnection Fee" or "ICF." In its August invoices to Indoor Billboard and its other customers, Integra introduced the new ICF surcharge with the following explanatory note:

> Due to recent FCC rulings, changes to government prescribed fees are reflected in this invoice. The LNP and PICC will no longer be assessed. Instead, the Interconnection Fee (ICF) will now recover network costs prescribed and regulated by the FCC and state public utility commissions. To learn more, visit http://www.Integratelecom.com/care/Icf.

(CP 246). The misleading nature of this explanation is apparent in light of Integra's explicit acknowledgement in its motion that "[t]he FCC simply does not regulate CLEC charges to their end-user customers." (CP 96).

Given that Integra's "PICC" surcharge had nothing to do with a customer's presubscription to an interexchange carrier and was entirely different than a true PICC as defined and regulated by the FCC, the obvious question is why Integra would choose to call its surcharge a Presubscribed Interexchange Carrier Charge or "PICC"? Integra's only answer to this question is that it did so for competitive marketing advantage. (CP 409). More specifically, because some of its competitors were purporting to assess "PICC" surcharges, Integra hoped to achieve a competitive marketing advantage by giving its new surcharge a name that the marketplace was already familiar with. (CP 409, 413; 424-25). As Mr. Huebsch noted in his internal memorandum, "many of our competitors have similar rate structures, however, the lower line rates should provide our sales force an opportunity to sell lines at competitive rates (without the PICC costs built in)." (CP 420) (Appendix B).

2. Integra's Failure to Disclose the True Nature of its "PICC" Surcharge to Indoor Billboard.

Indoor Billboard entered into a three-year Service Agreement with Integra on or about April 27, 2005 for five "Basic Business

Lines" of local exchange (dial tone) service plus DSL.[7] (CP 156-61). About one month earlier, Indoor Billboard's Vice-President, James Shulevitz, had received a written price quotation from Integra's sales representative, Erin McCune. (CP176). The price quotation quoted a monthly cost per line of $16.99 for each line of local exchange service and separately grouped and quoted three surcharges—a "Federal Access Charge" of $6.11 per line, per month, a "PICC" of $4.21 per line, per month, and a "Local Number Portability" surcharge of $0.43 per line, per month. (CP 176). The quotation did not contain any further description of the nature of these surcharges. (CP 176).

At the time he received Integra's price quote, it was Mr. Shulevitz's understanding that PICC charges were the purview of long distance carriers, not local exchange carriers. (CP 123). He accordingly questioned the "PICC" surcharge on the quotation, as he was seeking only local exchange service from Integra, stating in an email to Ms. McCune:

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[7] Indoor Billboard did not contract with Integra for either intrastate or interstate long distance service. (CP 156-61).

> I am not interested in your LD program as it appears over 30% more than what I am paying—so there would be no need to charge me PICC charges.

(CP 163). Although Mr. Shulevitz's inquiry presented a perfect opportunity for Ms. McCune to explain the true nature of Integra's "PICC" surcharge and clarify that it was different than the PICC created and regulated by the FCC (which as Mr. Shulevitz correctly understood can be passed on to customers by long distance carriers), she failed to do so. (CP 164).

Instead, Ms. McCune responded with the first of a series of misleading half-truths that Mr. Shulevitz would receive in response to his inquiries about Integra's "PICC"—advising that although she had "no problem" with Indoor Billboard using a different long distance carrier, "the PICC unfortunately cannot be waived, regardless of whether or not you use Integra as your LD carrier." (CP 164). This response was misleading, because it suggests that assessment of the surcharge was not within Integra's control—as would be the case with respect to a governmentally levied or regulated surcharge—when in fact the "PICC" was just another component of the price of Integra's services. Moreover, as a factual matter, Ms. McCune's response was factually incorrect, as Integra could and did waive the "PICC" in certain circumstances, as its

customer care call log reflects. (CP 208) ("PICC waived per contract.")

Mr. Shulevitz also questioned the amount of Integra's "Federal Access Charge," as it was higher than his current carriers. (CP 163). Ms. McCune responded that "CLEC surcharges, while monitored by the FCC, are not set by the FCC." (CP 164). Again, her response was misleading, because in point of fact, none of Integra's surcharges are "monitored" or regulated in any way by the FCC.[8] (CP 95-96).

On March 30, Mr. Shulevitz made a further inquiry to Ms. McCune about the "PICC" surcharge, this time asking why Integra's "PICC" would be substantially higher than the PICC quoted by a competitor, Eschelon. (CP 175). Again, Ms. McCune failed to explain the true nature of Integra's "PICC" or clarify that it was very different in nature than a true, FCC-regulated PICC.

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[8] In its motion, Integra points to the fact that another tele-communications carrier, Eschelon, had advised Mr. Shulevitz that its PICC was "not regulated by the government." (CP 87, 171). However, this advice was directly contrary to the advice of Integra's representative, Ms. McCune, that Integra's surcharges were "monitored" but "not set" by the FCC." (CP 164). Mr. Shulevitz felt he had reason to be "skeptical" about what the representative of Eschelon, as a competitor of Integra, had told him. (CP 129). In any event, the apparently conflicting advice left him confused about the nature of the surcharge. (CP 134-35).

Instead, she replied that "[d]ifferent CLECs have different PICC and LNP charges (as well as other charges), and these can vary by market." (CP 174). She also repeated that she was "unable to change them." (CP 174).

3. Indoor Billboard's Payment of the "PICC" Surcharge.

Upon receipt of his first invoice from Integra, dated June 8, 2005, Mr. Shulevitz noticed the "PICC" surcharge appeared under the "Taxes and Surcharges" section of his bill. (CP 55-56; 132). Mr. Shulevitz's testimony is that the itemization of the surcharge under the "Taxes and Surcharges" section of the bill, and the fact that it was called a "PICC," led him to believe the surcharge was an FCC-sanctioned tax or surcharge. (CP 439; 442-43). He also believed that Integra's "PICC" surcharge was the same as the PICC surcharge explained on the FCC's website, which he had reviewed in an attempt to further understand the nature of the charge. (CP 444-45).

Before paying Integra's June 8 invoice, Mr. Shulevitz made a further inquiry about the "PICC" surcharge by placing a call to Integra's "customer care" department on June 15. (CP 138, 140; 223). Mr. Shulevitz asked about the "PICC" and inquired that,

according to the FCC's website, the PICC was only to be charged by long distance carriers." (CP 144; 223). Mr. Shulevitz recalls that there was "some hemming and hawing" by the customer service representative about what the "PICC" surcharge was and that the customer service representative said he would have to investigate and call back with a more comprehensive answer. (CP 138, 145). When he did, his explanation left Mr. Shulevitz with the impression that "this charge was associated with the FCC, that it was approved by the FCC, sanctioned by the FCC, that it was okay with the FCC and it was a legitimate charge and they had every right to charge it." (CP 146; 223). Once again, Integra's representatives misled Mr. Shulevitz to believe that the "PICC" was an FCC-regulated surcharge, and failed to distinguish Integra's "PICC" as something very different than a true, FCC-regulated PICC.

Notwithstanding his continuing uncertainty about the appropriateness of Integra's "PICC" surcharge, Mr. Shulevitz proceeded to pay the June 8 invoice—including the $39.30 "PICC" surcharge—in full. (CP 147). He did so after unsuccessfully seeking further clarification about the surcharge from both the FCC and the WUTC—each of which pointed to the other agency's

regulatory authority over Integra's assessment of the surcharge.[9] (CP 136-37). Mr. Shulevitz explained in his deposition that because he wasn't certain the "PICC" surcharge was not appropriate, he was reluctant to begin his multi-year contractual relationship with Integra by contesting his first invoice. (CP 147-48).

III. SUMMARY OF THE ARGUMENT

Based on the record before it, the trial court erred in granting summary judgment in favor of Integra. With respect to the first element of Indoor Billboard's CPA claim (Integra's commission of an unfair and deceptive practice), the undisputed evidence showed that by name and presentation, Integra misrepresented the nature of the subject "PICC" surcharge to be an FCC-regulated Presubscribed Interexchange Carrier Charge, when it was not. Because Integra's misrepresentation of the surcharge as a "PICC" had the capacity to deceive a substantial portion of Integra's customers about the true nature of the charge, its actions constitute an unfair and deceptive practice as a matter of law. The trial court accordingly should have

[9] Although disclaiming WUTC jurisdiction over the surcharge, the WUTC representative also advised Mr. Shulevitz to pay the surcharge, wait a month, and see if it reappeared on the next bill, which he did. (CP 137).

granted partial summary judgment in favor of Indoor Billboard on this element of its CPA claim.

With respect to the fifth element of Indoor Billboard's CPA claim (causation), this Court held in Pickett that when a CPA claim is premised upon the deceptive mislabeling of a charge as something it is not, causation inheres in the payment of the charge and proof of individual reliance is not required. Moreover, even if proof of individual reliance were necessary to establish causation, Mr. Shulevitz's testimony—that he was misled to believe the subject surcharge was an FCC-regulated PICC and that he paid his entire phone bill, including the surcharge, still uncertain about the appropriateness of the charge—is sufficient to sustain a genuine issue of material fact concerning his reliance. By apparently resolving the causation issue against Indoor Billboard on summary judgment, the trial court ignored both this Court's holding in Pickett and the genuine factual issue concerning Indoor Billboard's reliance sustained by Mr. Shulevitz's testimony.

IV. ARGUMENT

A. This Court Reviews the Trial Court's Summary Judgment Decision *De Novo*.

The standard of review on summary judgment is well settled:

review is de novo, with the appellate court engaging in the same inquiry as the trial court. Trimble v. Washington State University, 140 Wn.2d 88, 92, 993 P.2d 259 (2000). Under CR 56(c), a party moving for summary judgment must demonstrate there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Id. at 93. All facts submitted, and all reasonable inferences from them are to be considered in the light most favorable to the non-moving party—in this case, Indoor Billboard. Id. "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." Id. (quoting Clements v. Travelers Indemnity Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); accord Holiday Resort Community Association v. Echo Lake Associates, 134 Wn. App. 210, 219, 135 P.3d 499 (2006)).

B. The Purpose of the Private Right of Action Under the CPA Is To Enlist the Aid of Private Parties in the Protection of the Public From Unfair and Deceptive Trade Practices.

The CPA declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" to be unlawful. RCW 19.86.020. The purpose of the Act "is to complement the body of federal law governing restraints

of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; see also Fisher v. World Wide Trophy, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976) (purpose of the CPA is to protect the public by prohibiting and eliminating injurious acts or practices). To this end, the Legislature has directed that the Act is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920.

When the CPA was first enacted in 1961, only the Attorney General had authority to enforce its provisions. See e.g., Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986). In 1971, however, the Legislature responded to the escalating need for additional enforcement capabilities by providing for "a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA." Id. at 784. As amended, the CPA now provides that any person who is injured in his or her business or property by a violation of RCW 19.86.020 "may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him, or both," together with costs of suit, reasonable

attorneys' fees, and treble damages at the discretion of the Court. RCW 19.86.090.

In its 1986 decision in Hangman Ridge, the Washington Supreme Court clarified the elements of a private CPA claim. 105 Wn.2d at 780. To prevail in such a private action, a plaintiff must establish five distinct elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. Id.

Integra's motion for summary judgment puts only the first and fifth elements of Indoor Billboard's CPA claim at issue.

C. The Washington Legislature Expressly Subjected "Competitive" Telecommunications Companies Like Integra to Liability under the CPA When It Deregulated the Telecommunications Industry in 1985.

To guard against potential abuses, the Washington Legislature specifically invoked the enforcement mechanism of the CPA when it deregulated the telecommunications industry in Washington in 1985. Prior to 1985, all telecommunications companies in Washington enjoyed immunity from the CPA by virtue of the "regulated industries" exemption to the CPA. See RCW 19.86.170 ("Nothing in this chapter shall apply to actions or

transactions otherwise permitted, prohibited or regulated under laws administered by . . . the Washington utilities and transportation commission. . . ."). This immunity was a product of the pervasive regulation of the industry by the WUTC in the public interest.

The regulatory landscape in Washington changed significantly in 1985, however, with the passage of Substitute Senate Bill 3305. In response to the court-ordered AT&T divestiture and accompanying changes in federal regulatory policy toward the telecommunications industry, SSB 3305 permits telecommunications companies in Washington to seek classification by the WUTC as a "competitive" telecommunications company pursuant to certain specified criteria. See RCW 80.36.310-.330; see also Final Legislative Report SSB 3305 (C. 450, L. 85) (Appendix C hereto). In contrast to the pervasive regulation of telecommunications companies by the WUTC under the pre-1985 law, tele-communications companies granted "competitive" classification by the WUTC under SSB 3305 are subject to "minimal regulation:"

> Competitive telecommunications companies shall be subject to minimal regulation. Minimal regulation means that competitive telecommunications companies may file, instead of tariffs, price lists. The commission may also waive other regulatory requirements under this title for competitive telecommunications

> companies when it determines that competition will serve the same purposes as public interest regulation . . ..

RCW 80.36.320. So, for example, as a "competitive" telecommunications company (CP 396), Integra is free to establish rates and charges for its services pursuant to a price list, which "is not a tariff and is not reviewed or approved by the commission." WAC 480-80-202 (emphasis supplied).

Mindful of the possible risk to the public of abuses in the new "deregulated" telecommunications environment, the Washington Legislature included in SSB 3305 a provision expressly excluding "competitive" telecommunications companies like Integra from the scope of the "regulated industries" exemption to the CPA set forth in RCW 19.86.170:

> For the purposes of RCW 19.86.170, actions or transactions of competitive telecommunications companies, or associated with competitive telecommunications services, shall not be deemed otherwise permitted, prohibited or regulated by the commission.

RCW 80.36.360 (emphasis supplied). The Legislature's intent in this regard is explicitly stated in the Final Legislative Report of SSB 3305: "Competitive telecommunications companies and services are subject to the Consumer Protection Act." Private CPA enforcement

actions such as this further the Legislature's intent by serving as a deterrent and enforcement mechanism against the commission of unfair and deceptive business practices by "competitive" telecommunications companies as they operate in the deregulated marketplace.

D. Integra's Assessment of the "PICC" Surcharge Was Unfair and Deceptive as a Matter of Law Because It Had the Capacity to Deceive a Substantial Portion of the Public About the *Nature* of the Charge.

In its motion, Integra asked the trial court to rule as a matter of law that its assessment of a surcharge falsely denominated as a "PICC" was not unfair or deceptive (the first element of a CPA claim), arguing that (1) as an unregulated "competitive" tele-communications carrier, Integra is free to charge customers whatever it wants, (2) other CLECs were also assessing surcharges denominated as "PICCs," so it was free to do so as well, and (3) it's disclosure of the $4.21 per line, per month "PICC" surcharge in its initial price quotation to Indoor Billboard precludes any possible claim of misrepresentation or deception. (CP 82, 95-100).

Indoor Billboard concurs that whether Integra's assessment of the "PICC" surcharge was unfair or deceptive presents an issue of the law that may appropriately be decided on summary judgment.

However, Indoor Billboard respectfully submits that the undisputed evidence of record requires partial summary judgment to be granted in its favor on this issue.[10]

1. A Practice Is Unfair or Deceptive Under the CPA if It Has the Capacity to Deceive a Substantial Portion of the Public.

Although whether a party committed a particular act or practice can present a factual issue, whether the act or practice constitutes an unfair or deceptive trade practice in violation of the CPA is a question of law for the Court to determine. Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997); Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 214, 969 P.2d 486 (1998). Under the CPA, a practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. Hangman Ridge, 105 Wn.2d at 785; Dwyer v. J. I. Kislak Mortgage, 103 Wn. App. 542, 547, 13 P.3d 240 (2000). Neither intent to deceive nor actual deception is required. Dwyer, 103 Wn. App. at 547; Nelson v. National Fund Raising Consultants, Inc., 120 Wn.2d 382, 292, 842 P.2d 478 (1992). A practice is deceptive if it

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[10] Where, as here, the facts are undisputed, the Court may enter summary judgment in the non-moving party's favor. See, e.g., Impecoven v. Department of Revenue, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

misleads or misrepresents something of material importance. Holiday Resort Comm. Ass'n., 134 Wn. App. at 226. Likewise, a "knowing failure to reveal something of material importance is 'deceptive' within the CPA." Robinson v. Avis Rent A Car System, Inc., 106 Wn. App. 104, 116, 22 P.3d 818 (2001) (citing Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 730, 959 P.2d 1158 (1998)).

2. Integra Misperceives Indoor Billboard's Theory of Its Case.

Integra's argument that Indoor Billboard cannot meet the first element of a private CPA claim rests on a misperception of the theory of Indoor Billboard's case. Indoor Billboard does not contend that Integra's practice of assessing a "PICC" surcharge is rendered unfair and deceptive by virtue of some regulatory prohibition of its assessment of such a surcharge. Indoor Billboard admits that, as a "competitive" telecommunications carrier, Integra was under no such affirmative regulatory prohibition. Nor does Indoor Billboard contend that Integra's "PICC" surcharge was unfair and deceptive by virtue of it being a "hidden" charge not initially disclosed in Integra's original price quotation. Indoor Billboard admits that Integra's price quotation did indeed disclose that Integra

would assess a "PICC" surcharge in the amount of $4.21 per line, per month. (CP 176).

Rather, Indoor Billboard's theory of this case is that Integra's actions had the capacity to deceive, and did deceive, its customers about the nature of the surcharge. Specifically, by calling the surcharge a "PICC" and itemizing it under the "Taxes and Surcharges" section of its invoice, Integra misrepresented the nature of the surcharge to be a governmentally regulated Presubscribed Interexchange Carrier Charge, rather than just an extra charge imposed by Integra as an additional component of the price for its services. Because the nature of a charge and whether it is subject to governmental regulation is clearly of "material importance" to a customer, Integra's misrepresentation of the true nature of its "PICC" surcharge is deceptive as a matter of law. See, e.g., Pickett v. Holland America Line—Westours, Inc., 101 Wn. App. 901, 920, 6 P.3d 63 (2000), reversed on other grounds, 145 Wn.2d 178, 35 P.3d 351 (2001) ("We simply hold that Holland America cannot impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes and fees—pass through charges—when they are not.") (emphasis supplied).

The record establishes that Integra knew full well that its surcharge had nothing to do with a customer's presubscription to an interexchange carrier, and was otherwise of an entirely different nature than a true PICC. (CP 410, 417; 420; 426). But rather than revealing this distinction between its "PICC" and a true, FCC-regulated PICC to its customers (or better yet selecting an altogether different name for its surcharge), Integra presented its "PICC" as a governmentally levied or regulated fee—rather than just an extra charge—by including it among the other "Taxes and Surcharges" itemized on its invoice. And the record is clear that its motivation for doing so was to obtain a competitive advantage in the marketing of its services. (CP 409, 413; 420; 424-25).

This theory of why Integra's assessment of its "PICC" surcharge was unfair and deceptive does not presume any regulatory violation by Integra and, as discussed further below, is not defeated by either the fact that other CLECs may also have been charging surcharges falsely denominated as "PICCs" or the fact that Integra disclosed in its initial price quote to Indoor Billboard that it would be assessing the surcharge.

3. Integra's Practice of Assessing the Falsely Denominated "PICC" Surcharge Had the Capacity to Deceive and Did Deceive Customers About the Nature of the Charge.

As discussed above, a true PICC is an FCC-regulated surcharge incumbent local exchange carriers may impose on the long distance carriers with whom their multi-line business customers have presubscribed, as a means of recovering a portion of the cost of providing the long distance carriers with access to the "local loop." (CP 378-79); see also 47 C.F.R. § 69.153 (Appendix A). When it appears on a customer's phone bill, a true PICC surcharge represents a pass-through of the FCC-regulated PICC paid to an incumbent local carrier by the customer's long distance carrier.[11]

Integra named and presented its "PICC" surcharge in a manner that had the capacity to deceive and did deceive its customers to believe that the nature of the surcharge was that of a true FCC-regulated Presubscribed Interexchange Carrier Charge, when it was not. It accomplished this deception through the following acts and practices, among others:

- Denominating its surcharge as a "Presubscribed Interexchange Carrier Charge" or "PICC," even though the surcharge had nothing to do with a customer's presubscription to an interexchange (long distance) carrier (CP 361; 407-08, 410-110; 420; 423-27);

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[11] In the rare instances when a customer does not presubscribe to any long distance carrier, the incumbent local carrier may assess a true PICC directly upon the customer. 47 C.F.R. § 69.153(b).

- Quoting almost verbatim from the FCC's definition of a true PICC in its description of the "PICC" surcharge in the "Guide to Surcharges, Taxes and Fees" page of its website (CP 392);

- Itemizing the surcharge under the "Taxes and Surcharges" section of its invoices, suggesting that it was a governmentally levied or regulated tax or fee, different in nature than Integra's standard monthly line charges for telephone service, which appear elsewhere in the invoice (CP 385);

- Telling customers that the "taxes and surcharges" that appear on their bills are "levied . . . on behalf of the government entities that administer these charges," on the Frequently Asked Questions page of Integra's website (CP 389); and

- Referring to the "PICC" surcharge as a "government prescribed fee" even as it replaced the surcharge with a new "Interconnection Fee" surcharge (CP 247).

Although intent to deceive is not a prerequisite of a private CPA action, these actions and statements on the part of Integra make a compelling case of intentional deception, particularly in light of Integra's explicit internal recognition that "[f]rom a technical perspective," a true PICC is defined as "a fee that long distance companies pay to incumbent local telephone companies to recover part of the local loop costs." (CP 420) (Appendix B).

The record establishes that Integra's misrepresentation of the nature of the surcharge did in fact deceive Indoor Billboard's Vice President, Mr. Shulevitz, to believe that the surcharge was an FCC sanctioned tax or surcharge—i.e., that Integra's "PICC" surcharge

was the same as the PICC established and regulated by the FCC. (CP 439, 445). Even in the face of Mr. Shulevitz's inquiries, Integra's representatives never revealed the true nature of the charge—instead advising that the "PICC" surcharge "cannot be waived," (CP 164), that Integra's surcharges were "monitored" but "not set" by the FCC (Id.), and that "it is legal with the FCC to charge this"(CP 145)—leaving Mr. Shulevitz with the impression that Integra's "PICC" surcharge was "approved by the FCC" and "sanctioned by the FCC." (CP 146).

Mr. Shulevitz was not alone. A customer care call log produced by Integra reveals numerous examples of customer confusion over the "PICC" surcharge and several instances in which Integra's representatives provided misleading information about the surcharge. (CP 201-21). The following excerpts are illustrative:

- [Customer] called in about PICC charge on his bill. He doesn't think we should be charging the PICC b/c his LD carrier is charging the PICC as well. (CP 212) (Customer Sub ID 100747).
- [Customer] was concerned that she was being charged for PICC when she doesn't have LD with us. (CP 218) (Customer Sub ID 121393).
- [Customer] [h]ad some billing questions. He thinks over 50% of his bill is for taxes where with Verizon he

only paid about 25% in taxes. I explained that the PICC was the only tax on the "taxes and surcharges" portion of the bill that were [sic] probably included in the line pricing with Verizon. (CP 203) (Customer Sub ID 145528).

- [Customer] [w]as upset about PICC charges and said that he was not receiving the assistance he was expecting. He said that when he called in with questions about what a PICC is, how it was billed and how much it was he was transferred around from person to person. (CP 204) (Customer Sub ID 100577).

- [Customer] concerned about PICC fees—explained that all companies charge this to route LD calls. (CP 211) (Customer Sub ID 102706).

The undisputed evidence establishes that Integra falsely named its surcharge a "PICC" purely for competitive marketing purposes, when by its nature the surcharge was not a Presubscribed Interexchange Carrier Charge as established and regulated by the FCC. And rather than revealing the distinction between its "PICC" and a true, FCC-regulated PICC to its customers, Integra in a number of ways presented its "PICC" surcharge as if it were a true PICC, rather than just another component of the price of its services. These misrepresentations clearly had the capacity to and did deceive Indoor Billboard and Integra's other customers about the true nature of the "PICC" surcharge, and were therefore unfair and deceptive under the CPA as a matter of law.

John Nee, the Vice-President of Marketing of Integra's parent company, admitted as much in his deposition testimony:

> Q: In fact it would be deceptive, would it not, for you to lead your customers to believe that the PICC surcharge you're assessing is the same thing as what the FCC calls a PICC surcharge?
>
> **A: Yes, it would be deceptive.**
>
> Q: Because they're different things, aren't they?
>
> **A: Right.**

(CP 434).

4. Integra's Mere Disclosure that It Would Be Assessing a "PICC" Surcharge Does Not Defeat Indoor Billboard's CPA Claim, Because Integra Never Disclosed the True Nature of the Charge.

Integra's disclosure to Indoor Billboard in its initial price quotation that it would be assessing a "PICC" surcharge in the amount of $4.21 per line, per month is not dispositive of whether Integra's assessment of the surcharge was unfair and deceptive. As discussed above, the theory of deception in this case is not that the "PICC" surcharge was a hidden charge but rather that the nature of the charge was misrepresented. This Court held in Pickett that misrepresenting the nature of a charge violates the CPA here in Washington:

> We simply hold that Holland America cannot impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes, and fees—pass through charges—when they are not. The Washington CPA should be liberally construed to protect the public and foster honest competition.

Pickett, 101 Wn. App. at 920. Likewise, under the CPA, Integra cannot impose on its customers a surcharge which is not a PICC, yet call it a "PICC"—an FCC-regulated and defined fee—when it is not.

This case is therefore quite distinguishable from the Robinson case relied upon by Integra in its motion, because Robinson involved a CPA claim based on a hidden charge theory. 106 Wn. App. at 115-16 ("[Q]uoting a car rental price that does not include a concession fee that is also charged would have the capacity to deceive the purchasing public, absent disclosure of that fee."). Robinson correctly and unremarkably holds that where the theory of the CPA claim is based on an allegedly hidden fee, undisputed proof that the fee was in fact disclosed with the original price quote defeats the claim. 106 Wn. App. at 116-17. Robinson does not hold that mere disclosure of the existence of the charge would be a defense to

a CPA claim based on a theory that the nature of the charge was misrepresented.[12]

The case of Dwyer v. J.I. Kislak Mortgage, 103 Wn. App. 542, 13 P.3d 240 (2000), is instructive. In Dwyer, a mortgage company included on its payoff statement for a mortgage loan a "miscellaneous service charge" of $50.00, pertaining to fax fees. The plaintiff alleged that including this "miscellaneous service charge" on the payoff statement was deceptive under the CPA, because a reasonable consumer would believe that the mortgage would not be released without payment of the fax fee charge, when in fact the charge was not secured by the subject mortgage and therefore could not be a condition of its release. Id. at 544-45. Like Integra in this case, the mortgage company in Dwyer argued on summary judgment that its charging of the fax fee could not be unfair or deceptive under the CPA, because it was fully disclosed. Id. at 545. The trial court agreed and entered summary judgment in the defendant's favor.

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[12] Although the plaintiffs in Robinson also alleged that the defendant had misrepresented the nature of the concession fee at issue to be a tax, that claim was dismissed for lack of evidence of any such misrepresentation—not on the basis that the concession fee had been disclosed at the time of the original price quotation. Id. at 120-22.

On appeal, this Court reversed, holding that although the fax fee was fully disclosed, its inclusion on the payoff statement with other obligations that were secured by the mortgage had the capacity to deceive reasonable consumers into believing that the mortgage would not be released unless the fax fees were paid. Id. at 547. The Court noted that its holding "does not infringe on Kislak's right to charge a fax fee. It merely forecloses the ability to do so in a deceptive manner." Id. at 548.

Similarly, in the present case, Integra was free to include a surcharge as a component of the price for its telephone service to customers. But the CPA precludes Integra from doing so in a deceptive manner. Although Integra repeatedly asserts in its motion that it "fully disclosed the nature of its PICC surcharge to Indoor Billboard" (CP 97), the record is bare of any evidentiary support for this assertion. Rather, the record reveals only that Integra disclosed the name and amount of the "PICC" surcharge to Indoor Billboard. Integra clearly did not disclose the true nature of the charge, preferring instead to allow Indoor Billboard and other customers to presume that the "PICC" surcharge was in fact an FCC-regulated

fee, rather than just an additional component of the price for Integra's service.

E. The Evidence of Record Was Sufficient to Meet the Causation Element of Indoor Billboard's CPA Claim.

Integra's summary judgment motion also contests Indoor Billboard's ability to meet the fifth element of a CPA claim under Hangman Ridge—causation. (CP 100-04). In support of its causation challenge, Integra argues (1) that Indoor Billboard cannot establish it paid the "PICC" surcharge in reliance upon Integra's misrepresentations about the nature of the charge (CP 101), (2) that Mr. Shulevitz's inquiries about the appropriateness of the "PICC" surcharge break any causal link between Integra's misrepresentations and Indoor Billboard's injury (CP 102), and (3) that Indoor Billboard's payment of the "PICC" surcharge, notwithstanding Mr. Shulevitz's uncertainty about the appropriateness of the charge, bars Indoor Billboard's claim under the "voluntary payment doctrine" (CP 103-04). As discussed below, each of these arguments is without merit.

1. This Court Held in *Pickett* that Proof of Individual Reliance is Not Required To Meet the Causation Element of a Private CPA Claim Based on Deceptive Mislabeling of a Charge.

To satisfy the causation element of a private CPA claim, a plaintiff must prove "a causal link . . . between the unfair or deceptive acts and the injury suffered by plaintiff." Hangman Ridge, 105 Wn.2d at 793. Prior to Hangman Ridge, the CPA had been interpreted to require a showing that the defendant's acts had "induced" the plaintiff to act or refrain from acting or causing damage. See Anhold v. Daniels, 94 Wn.2d 40, 46, 614 P.2d 184 (1980). But the Supreme Court eliminated mention of "inducement" when it reformulated the five elements of a private CPA claim in Hangman Ridge, 105 Wn.2d at 780, and has since termed it "debatable" whether actual reliance is required.[13] Pickett, 145 Wn.2d at 197.

Since Hangman Ridge, this Court has twice stated that "[i]njury and causation are established if the plaintiff loses money because of unlawful conduct." Pickett, 101 Wn. App. at 916;

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[13] As a pre-Hangman Ridge case, the Nuttall decision relied upon by Integra in support of its reliance argument is not controlling. See Nuttall v. Dowell, 31 Wn. App. 98, 639 P.2d 832 (1982).

Robinson, 106 Wn. App. at 113-14 (citing Pickett). And in Pickett, this Court explicitly held that individual reliance is not required to establish causation in a private CPA action, at least not where, as in this case, the claim is premised on a deceptively mislabeled charge. 101 Wn. App. at 920 ("We need not engage in an inquiry whether each plaintiff would have purchased a cruise ticket had they known [the truth] about the port charges and taxes.").

In Pickett, the defendant cruise line argued that the plaintiffs' ignorance of the deceptively mislabeled surcharge for "port charges and taxes" precluded a finding of causation "because the plaintiffs could not rely on the alleged deceptive practices." Id. at 915. This Court rejected the defendant's argument, holding that causation "inhered" in the plaintiff's purchase of cruise tickets containing the deceptively mislabeled charge:

> Here, purchaser-plaintiffs' payment of "port charges" is part of a common factual scheme. Purchase of a cruise ticket is the single event that occasioned each plaintiff's injury. Causation inheres in the fact that the plaintiffs purchased cruise tickets. Holland America overstated and retained a portion of the funds it had misrepresented were the amount of pass through charges for port charges and taxes. We need not engage in an inquiry whether each plaintiff would have purchased a cruise ticket had they known about the port charges and taxes. We simply hold that Holland America cannot impose on passengers fees, which are

> not port charges and taxes, and yet call them government charges, taxes, and fees—pass through charges—when they are not. The Washington CPA should be liberally construed to protect the public and foster honest competition.

101 Wn. App. at 920 (emphasis supplied).

The Washington Supreme Court subsequently concluded this Court had erred in reexamining the trial court's original class certification decision, and accordingly reversed on that ground. Pickett, 145 Wn.2d at 188-91. Although the Supreme Court characterized as "debatable" this Court's citation to the Edmonds[14] and Mason[15] decisions for the proposition that injury and causation are established in a private CPA action "if the plaintiff loses money because of unlawful conduct," it did not expressly overrule this Court's holding that individual reliance is not required to prove causation under the CPA. Rather, the Supreme Court held only that, "[u]nder the posture of this case, we believe it is enough to say that this is a debatable question without a clear answer under Washington law at the time of the parties' settlement . . .." 145 Wn.2d at 197 (emphasis supplied).

In the present case, this Court should hold, as it did in Pickett, that causation inheres in Indoor Billboard's payment of the falsely-

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[14] Edmonds v. John L. Scott Real Estate, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997).

[15] Mason v. Mortgage America, Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

denominated "PICC" surcharge and that no inquiry into whether Indoor Billboard would have paid the surcharge had it known the true nature of the charge is necessary. 101 Wn. App. at 920. Like the cruise line in Pickett, Integra cannot impose on its customers a surcharge, which is not a Presubscribed Interexchange Carrier Charge, and yet call it a PICC—an FCC-defined and regulated charge—when it is not. Id. Construing the CPA in this manner will serve the "beneficial purposes" of the Act and protect the public from deceptive billing abuses by "competitive" telecommunications carriers, as the Washington legislature intended.

2. Even Were Reliance Required, Mr. Shulevitz's Testimony That He Was Misled to Believe Integra's "PICC" was an FCC-Regulated PICC Surcharge When He Paid It Sustains a Genuine Issue of Fact Concerning His Reliance.

Even if actual reliance or inducement were required to establish causation under the CPA, the evidence of record is sufficient to sustain a genuine issue of fact on that issue for the jury to decide. The evidence is that Integra chose to mislabel its new surcharge as a "PICC" precisely because it expected customers to be more receptive to a surcharge with which the marketplace was already familiar—i.e., to induce customers to accept and pay the surcharge without questioning it. (CP 409, 413; 424-25). The evidence is that by calling the surcharge a "PICC" and placing it

under the "Taxes and Surcharges" section of its invoice, Integra misled Mr. Shulevitz to believe that the surcharge was a true, FCC-regulated PICC as described on the FCC's website. (CP 439; 438-40; 442-45). Further, the evidence is that Indoor Billboard paid its first invoice from Integra, including the "PICC" surcharge, only after Mr. Shulevitz was assured by Integra's customer care representative that "it is legal with the FCC to charge this"—leaving him with the continuing impression that "this charge was associated with the FCC, that it was approved by the FCC, sanctioned by the FCC, that it was okay with the FCC" to charge it. (CP 146, 223). Far from having a full understanding of the true nature of the "PICC" surcharge, Mr. Shulevitz's testimony is that he still "wasn't certain" whether the PICC was an appropriate charge, but that he nevertheless authorized payment of the first Integra invoice because he was reluctant to contest a charge on his very first bill at the start of a multi-year contractual relationship. (CP 147-49).

Viewed in the light most favorable to Indoor Billboard, this evidence is more than sufficient to establish that Mr. Shulevitz paid the first Integra invoice containing the "PICC" surcharge in reliance upon Integra's misleading denomination and representation of the surcharge as a legitimate FCC-regulated PICC. Accordingly, Indoor Billboard is entitled to have a jury determine whether the "causal

link" required by the fifth element of Hangman Ridge is satisfied here, and summary judgment was inappropriate under CR 56(c).

The Nuttall case is not to the contrary. A pre-Hangman Ridge decision, Nuttall did not involve a summary judgment determination on causation. Rather, the case involved an appeal from the trial court's decision after a bench trial, on "conflicting evidence," that the plaintiff's independent investigation of the boundary line at issue in that case broke the causal connection between the defendant's misrepresentation of the boundary and plaintiff's damages. 31 Wn. App. at 104, 111. Division Two of the Court of Appeals affirmed the trial court's decision as supported by substantial evidence:

> Despite the lessened burden of proof, the trier of fact must still find that a CPA violation resulted in or caused the damages for which plaintiff seeks recovery. Here, on conflicting evidence, the trial court found that plaintiff did not rely upon defendant's representations relating to the western boundary but investigated the boundary independently. As stated above this finding is supported by substantial evidence. (emphasis supplied)

31 Wn. App. at 111. Nuttall does not stand for the proposition that a plaintiff's independent investigation of the subject of a subsequent CPA claim necessarily breaks the "causal link" required by

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> Despite the lessened burden of proof, the trier of fact must still find that a CPA violation resulted in or caused the damages for which plaintiff seeks recovery. Here, on conflicting evidence, the trial court found that plaintiff did not rely upon defendant's representations relating to the western boundary but investigated the boundary independently. As stated above this finding is supported by substantial evidence. (emphasis supplied)

31 Wn. App. at 111. Nuttall does not stand for the proposition that a plaintiff's independent investigation of the subject of a subsequent CPA claim necessarily breaks the "causal link" required by

Hangman Ridge as a matter of law, as Integra argues in its motion. Indeed, such a rule would frustrate the Legislature's mandate that the CPA be liberally construed to effectuate its beneficial purposes, because it would allow a defendant to avoid liability under the Act simply by showing that the plaintiff had raised some question about a deceptive charge before paying it. That is simply not the law.

3. The Voluntary Payment Doctrine Does Not Entitle Integra to Summary Judgment, Because a Genuine Issue of Fact Exists Concerning Mr. Shulevitz's Understanding of Integra's "PICC" Surcharge When He Paid the Charge.

Integra's invocation of the voluntary payment doctrine in support of its summary judgment motion fails as well, because even assuming, *arguendo*, that this contract defense is available in a CPA action, the evidentiary record here sustains a genuine factual issue concerning whether Indoor Billboard had "full knowledge of all the facts" when it remitted payment of the "PICC" surcharge to Integra, as application of the doctrine requires. See Speckert v. Bunker Hill Arizona Mining Co., 6 Wn.2d 39, 52, 106 P.2d 602 (1940) ("Each case must necessarily depend on its own peculiar facts. A rule which will furnish a safe guide in the determination of particular

cases is that where a person pays an illegal demand, with a full knowledge of all the facts which render the demand illegal . . . such payment is voluntary.") (emphasis supplied). As discussed above, the evidence of record falls far short of establishing that Mr. Shulevitz had "full knowledge" of the true nature of Integra's "PICC" surcharge when Indoor Billboard remitted payment for that surcharge. Accordingly, adjudication of Integra's voluntary payment doctrine defense cannot be made on summary judgment under the criteria of CR 56(c). To this extent only, the trial court was correct in rejecting Integra's invocation of this doctrine, as it noted in its decision. (CP 293).

V. CONCLUSION

For the foregoing reasons, the trial court erred in granting summary judgment in Integra's favor, dismissing Indoor Billboard's CPA claim. Indoor Billboard respectfully requests that this Court reverse the trial court's summary judgment decision, vacate the Judgment entered in favor of Integra, and remand this action for trial.

RESPECTFULLY SUBMITTED this 18th day of October, 2006.

MUNDT MacGREGOR L.L.P.

By _____
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PROOF OF SERVICE

Cheryl A. Phillips states as follows:

I am over the age of eighteen (18) years and not a party to this action.

I am employed by Mundt MacGregor L.L.P. and my business address is 999 Third Avenue, Suite 4200, Seattle, Washington 98104.

On October 18, 2006, I caused a copy of the above Brief of Appellant to be served on counsel of record, via overnight FedEx delivery, addressed to the following:

Sarah J. Crooks
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DATED at Seattle, Washington this 18th day of October, 2006.

Cheryl A. Phillips

Cheryl A. Phillips

Appendix A

Westlaw.

47 C.F.R. § 69.153

C

Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 47. Telecommunication
Chapter I. Federal Communications Commission (Refs & Annos)
Subchapter B. Common Carrier Services
Part 69. Access Charges (Refs & Annos)
Subpart C. Computation of Charges for Price Cap Local Exchange Carriers (Refs & Annos)

→§ 69.153 Presubscribed interexchange carrier charge (PICC).

(a) A charge expressed in dollars and cents per line may be assessed upon the Multi-line business subscriber's presubscribed interexchange carrier to recover revenues totaling Average Price Cap CMT Revenues per Line month times the number of base period lines less revenues recovered through the End User Common Line charge established under § 69.152 and Interstate Access Universal Service Support per Line month (as defined in § 54.807 of this chapter) multiplied by base period lines for the applicable customer class and zones receiving such support, up to a maximum of $4.31 per line per month. In the event the ceilings on the PICC prevent the PICC from recovering all the residual common line/marketing and residual interconnection charge revenues, the PICC shall recover all residual common line/marketing revenues before it recovers residual interconnection charge revenues.

(b) If an end-user customer does not have a presubscribed interexchange carrier, the local exchange carrier may collect the PICC directly from the end user.

(c) [Reserved]

(d) Local exchange carriers shall assess no more than five PICCs as calculated under paragraph (a) of this section for Primary Rate Interface ISDN service.

(e) The maximum monthly PICC for Centrex lines shall be one-ninth of the maximum charge determined under paragraph (a) of this section, except that if a Centrex customer has fewer than nine lines, the maximum monthly PICC for those lines shall be the maximum charge determined under paragraph (a) of this section divided by the customer's number of Centrex lines.

(f) The PICC shall not be applicable to any payphone lines.

(g), (h) [Reserved]

[62 FR 40460, July 29, 1997; 62 FR 48486, Sept. 16, 1997; 62 FR 56132, Oct. 29, 1997; 63 FR 2132 , Jan. 13, 1998; 63 FR 49870, Sept. 18, 1998; 63 FR 55335, Oct. 15, 1998; 64 FR 46594, Aug. 26, 1999; 65 FR 38703, June 21, 2000; 65 FR 57744, Sept. 26, 2000; 68 FR 43329, July 22, 2003]

SOURCE: 48 FR 10358, March 11, 1983; 62 FR 31935, June 11, 1997; 62 FR 32962, June 17, 1997; 62 FR 41306, Aug. 1, 1997; 62 FR 48486, Sept. 16, 1997, unless otherwise noted.

AUTHORITY: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

47 C. F. R. § 69.153, 47 CFR § 69.153

Current through April 20, 2006; 71 FR 20472

Appendix A

Appendix B

PICC*

As a CLEC we have the flexibility in defining and organizing our service charges the way we believe makes best business sense. We could set one line price to include all our charges (and costs). Or we can structure our line rates with more definition to include the FAC, LNP, and PICC. We have chosen to break out the line components in order to better address the competitive environment and to help us manage our cost components.

Beginning next week we will be assessing a PICC on all our business lines. With the inclusion of the PICC we have **significantly lowered our Basic Business Lines rates.** New, lower line rates plus the PICC has replaced a higher line rate without the PICC. Note, **each operating market has set the new line rates and the net affect on ARPU is a result of this effort.** Yes, many our competitors have similar rate structures, however, the lower line rates should provide our sales force an opportunity to sell lines at competitive rates (without the PICC costs built in).

If we elect to exclude customers from the PICC, such as users who choose another switch access carrier, then the lower line rate (without a PICC) does not make business sense. In this situation we could either establish a higher line rate (back to the old rates) or treat everyone the same.

*From a technical perspective, the PICC is defined as a fee that long distance companies pay to incumbent local telephone companies to recover part of the local loop costs. As a "long distance" company Integra must pay the various local telephone companies for local access and, as a "local" exchange company, we take on costs to access the long distance networks. Integra "local" assumes costs to deliver our "long distance" services to our customers. In turn, we charge a PICC to our end user customers to help recover these costs. And if a customer does not select a long distance provider the local telephone company may still assess a PICC.

EXHIBIT
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Hvebsch 3-1-06

Appendix B

CONFIDENTIAL

Appendix C

SSB 3305

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By Committee on Energy & Utilities (originally sponsored by Senators Williams, Benitz, McManus, Kreidler and Garrett)

Permitting regulation of certain telecommunications companies and services.

Senate Committee on Energy & Utilities

House Committee on Energy & Utilities

BACKGROUND:

Because of changes in the structure of the telecommunications industry associated with the AT&T divestiture and accompanying changes in federal regulatory policy, the Legislature created the Joint Select Committee on Telecommunications to study the impacts of such changes on the Washington State regulatory scheme. Currently, many telecommunications markets, such as the market for long distance service, are becoming competitive. In these markets, competitive forces may provide adequate protection for ratepayers. The Committee recommended that the monopoly ratepayer remain the focus of continued regulation of the telecommunications industry, but that the industry should also be afforded regulatory flexibility where services are offered in a competitive market. The Committee further recommended giving the Washington Utilities and Transportation Commission considerable discretion in regulating telecommunications providers.

SUMMARY:

It is state policy to preserve affordable universal telecommunications service, prevent cross subsidy from noncompetitive to competitive services, and promote diversity of supply in telecommunications.

Telecommunications companies or the Commission may begin proceedings to classify competitive telecommunications companies or services. The Commission may consolidate proceedings. The Commission may classify companies as competitive if their customers have reasonably available alternatives and they have no significant captive customer base. Competitive companies file price lists instead of tariffs. The Commission may waive other regulatory requirements.

The Commission may classify services as competitive if customers have reasonably available alternatives and the services are not offered to a significant captive customer base. The Commission is given regulatory authority to protect universal service and insure that noncompetitive services do not subsidize competitive services.

The Commission may approve banded rate tariffs.

Telecommunications companies which begin service in Washington after January 1, 1985 must register with the Commission. The Commission is to review the financial and technical competence of the applicant and may require a performance bond or that deposits be held in escrow or trust.

Competitive telecommunications companies and services are subject to the Consumer Protection Act.

The Commission may not regulate broadcast transmission or cable television retransmission of television or radio signals; private telecommunications systems; telegraph companies; the sale, lease or use of customer premises equipment; or private shared telecommunications services, subject to certain conditions.

Sections of Title 80 are conformed to new definitions of telecommunications companies and services. Several definitions in Title 80 RCW are altered or added.

The Commission is required to provide an annual report on the status of the Washington State telecommunications industry, on various market trends and on the level of competition in all relevant markets. The report is also to address whether additional legislative changes in the state's regulatory scheme are necessary. The Legislature is directed to conduct a review in the 1989-1991 biennium to determine whether the purposes of the act have been achieved and whether further relaxation of regulatory requirements is in the public interest.

VOTES ON FINAL PASSAGE:

Senate	45	1	
House	96	0	(House amended)
Senate	46	1	(Senate concurred)

EFFECTIVE: July 28, 1985

Appendix C